

INSTITUTIONAL RELIGIOUS SYMBOLS, STATE NEUTRALITY AND PROTECTION OF MINORITIES IN EUROPE

JAVIER MARTÍNEZ-TORRÓN

Abstract: This article examines religious symbols from the perspective of what is meant by state neutrality in religious matters and argues that neutrality cannot be a uniform constitutional principle, enforced at the European level, containing a particular notion of how the relations between state and religion should be structured. It argues that the judgement of the Grand Chamber in Lautsi II was correct but that the Court could have developed the idea that coercion should be the test for a violation of freedom of religion or belief, and not the subjective feeling of offence experienced by some persons in the presence of some religious symbols. The article, in addition to looking at the jurisprudence of the ECtHR, also looks at that of continental national courts with a particular emphasis on the approach adopted in Spain and Germany.

Introduction: Why religious symbols in the public space are a subject worth of study

In the last years, scholars have paid considerable attention to the issues raised by the use of religious symbols in the public space. This unprecedented display of literature on religious symbols in the last years – not only legal literature – suggests this continues to be a subject worth of study. Indeed, I am persuaded that religious symbols are a very significant topic for study, that we are not overestimating its interest. My persuasion is based on two main reasons.

The first one is obvious: religious symbols in the public space are a significant subject for study because they are *important for many people* around the world. In Europe, the case law of the European Court of Human Rights (hereinafter ECtHR) is expressive of how significant Christian and Islamic symbols are for people in a number of countries.¹

¹ See, for instance, among others: *Dahlab v. Switzerland*, Decision on the admissibility of Appl. Nr. 42393/98, 15 February 2001; *Leyla Şahin v. Turkey*, 29 June 2004 (Chamber's decision), and *Leyla Şahin v. Turkey*, 10 November

The geographical and human landscape of Islamic countries is inconceivable without their religious symbols, and the same occurs in countries with a strong and ancient Christian tradition. Christian symbols and names permeate the entire social life in most Western countries. Public institutions often have a patron saint, their buildings display Christian signs and even public corporations have a symbolic participation in religious ceremonies.² Recently, the use of full-face veil by Muslim women (*burka*, *niqab*) has caused a heated public debate in Europe, which is still ongoing and has led to legislation in France and Belgium, as well as to legislative initiatives in The Netherlands and Spain.³ Of course, the United Kingdom has not been an exception and the courts have been asked to adjudicate on conflicts deriving from individuals' moral obligation to wear objects of religious significance in public places.⁴ These few examples tell us that religious symbols

2005 (Grand Chamber's decision); *Dogru v. France*, and *Kervanci v. France*, both of 4 December 2008; *Ahmet Arslan et al. v. Turkey*, 23 February 2010; *Lautsi v. Italy*, 3 November 2009 (Chamber's decision), and *Lautsi v. Italy*, 18 March 2011 (Grand Chamber's decision); *Eweida and others v. United Kingdom*, 15 January 2013.

² See, for instance, in Spain, the facts that were at the origin of the decisions mentioned are set out later in this paper.

³ See, for further legal and bibliographical references: B. Aláez, *Some constitutional thoughts about the Islamic full veil ban in Europe*, in 7-3 Vienna Journal of International Constitutional Law (2013) (forthcoming); M.T. Areces, *La prohibición del velo integral islámico. A propósito de la sentencia del Tribunal Supremo* and A. López-Sidro, *Restricciones al velo integral en Europa y en España: la pugna legislativa por prohibir un símbolo*, both of them in 32 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado (2013) (www.iustel.com); V. Camarero, *El velo integral y su respuesta en democracias europeas*, Tirant Lo Blanch, Valencia, 2012; R. Navarro-Valls & J. Martínez-Torrón, *Conflictos entre conciencia y ley: las objeciones de conciencia* (2d ed.), Iustel, Madrid, 2011, pp. 378-384; A. Overbeeke, *Towards a General Burqa Ban in The Netherlands?*, in 'The Burqa Affair across Europe: between Private and Public', Ashgate, Aldershot 2013, pp. 101-126; G. van der Schyff & A. Overbeeke, *Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans*, in 7 European Constitutional Law Review (2011), pp. 424-452

⁴ See, for instance, among legal literature published in Spain about UK cases: J. G. Oliva, *La cuestión de la simbología religiosa en el Reino Unido*, in 15 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado

matter to people and, therefore, neither the law nor legal scholarship can be indifferent to them.

There is also a second reason, which is the one that more directly inspired this paper. Religious symbols in the public space are a significant topic for study because they are closely *connected with the notion of state neutrality* towards religion, which tends to be conceived in the West, more and more, as a necessary condition for the adequate protection of freedom of religion and belief.

When we engage in the legal study of religious symbols in the public sphere from the perspective of state neutrality there are – among others – three distinctions that should be taken into account.

First, we must distinguish between *personal* and *institutional* symbols. Certainly, when designing the public space there is a distinction between permitting the personal use of religious symbols (clothing, objects of veneration, etc.) and permitting - or imposing - the display of religious symbols in public areas, buildings or institutions.⁵ However, as I will explain in this paper, the practical solutions adopted for both types of symbols are often interrelated and depend on an underlying notion of state neutrality.

Second, if we refer particularly to Europe, as is the intention of this paper, we must differentiate between the appropriate solutions that could – or should – be found at a *pan-European* level (i.e., at the level of the Council of Europe) and at the *national* level of each European country. This distinction is of the utmost importance, for the common concept of state neutrality applicable to all European countries is not equivalent to the parallel notion of state neutrality that each of those

(2007), pp. 1-14; M. Hill, *Simbología religiosa y objeción de conciencia en el lugar de trabajo*, in 32 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* (2013), pp. 1-15 (which is an extended version, in Spanish of the paper, by the same author, *Religion at work*, in 163 *New Law Journal*, pp. 89-90).

⁵ Of course, further distinctions would be necessary. For instance, to distinguish between different types of public spaces (the impact and significance of a religious symbol is different in a public square, a hospital, a school, a courtroom or a parliament); or to take into account if only one religious symbol or a variety of symbols are displayed.

countries have adopted in their respective constitutions (and constitutional jurisprudence).

Third, we must distinguish between *public policies* and the *law applied by the courts*. This differentiation is also of great consequence, because in the democratic process the courts are not per se the place to design the (allegedly) most adequate public policies – this is the competence of legislatures and governments. The role of the courts is circumscribed to apply the law of the land. This means, in the area of religious symbols, to adjudicate on fundamental rights, i.e., to decide if certain policies or practices concerning religious symbols impinge upon the freedom of religion and belief or other fundamental rights of citizens. Such a limited role implies a self-restraint on the part of the courts. In a particular case, the judges may be well convinced that a certain policy or practice concerning religious symbols is not the most appropriate one, and nonetheless their function consists strictly in determining if such policy or practice is acceptable within the legal framework for which they are responsible. In Europe, this legal framework is defined by the relevant constitutions, for national courts; and by the European Convention of Human Rights, for the ECtHR. The courts are not asked to say whether they agree or not with the choices taken by the legislator or the government. They are asked to say if the legislator or the government have acted against constitutional rights or against the fundamental freedoms recognized by the European Convention on Human Rights (hereinafter ECHR).

Taking into account the foregoing distinctions, this paper will adopt a strictly *legal* perspective, from which I will examine the issue of *institutional* religious symbols at a *pan-European* level. In other words, I will focus on which should be the role and position of the ECtHR with regard to public policies on the display of institutional religious symbols. In addition, I will make some brief comparative remarks with Spanish and German jurisprudence.

Which State Neutrality?

As indicated above, there is an increasing tendency to point out religious neutrality as one of the necessary characteristics of contemporary democratic states. Defining the notion of state neutrality,

therefore, becomes a crucial issue if we agree with such tendency.

From a pan-European perspective, the first approach is a negative one – i.e. to define what state neutrality is *not*.

In this respect, it is clear that neutrality *cannot be a uniform constitutional principle*, enforced at the European level, containing a particular notion of how the relations between state and religion should be structured. The ECtHR has since long held that the European Convention is aimed at guaranteeing certain fundamental freedoms – among them religious freedom – but does not impose any particular model of relations between state and religion.⁶ The underlying assumption is that the state's attitude towards religion is primarily a matter of political choice, and is the result, to a large extent, of the historical tradition and the social, moral and cultural circumstances of each country. The legal framework of the European Union – in particular, Article 17 of the Treaty on the Functioning of the European Union – is even more specific about the fact that there is no uniform European rule on the status of churches and religious communities, and that this is a matter that has to be decided at the national level.⁷

For those reasons, *neutrality cannot be understood as synonymous with strict separation* between state and religion. This is a strong differential factor between the analysis of issues raised by institutional religious symbols in Europe and in the United States, respectively. In the US, the courts' construction of the constitutional establishment clause plays a crucial role and prevents any use of religious symbols that can lead to

⁶ See, for further details and references, J. Martínez-Torrón & R. Navarro-Valls, *The Protection of Religious Freedom in the System of the Council of Europe*, in 'Facilitating Freedom of Religion and Belief: A Deskbook' (ed. by T. Lindholm, C. Durham & B. Tahzib-Lie), Martinus Nijhoff, Leiden, 2004, pp. 216-218.

⁷ This is the text of Article 17 of the Treaty on the Functioning of the European Union: '1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. – 2. The Union equally respects the status under national law of philosophical and non-confessional organisations. – 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.'

an interpretation that the state is endorsing religion in general or – even less – a particular religion.⁸

The foregoing does not mean that strict separation between state and religion cannot be adopted in Europe, or that it is precluded by the ECHR. On the contrary, separation is one of the legitimate choices that European states have at their disposal. But note this: the discussion about adopting or not a system of separation, as the best way to guarantee state religious neutrality, must take place at the national level – i.e., at the level of each country's constitutional principles that define the framework of relations between state and religion. France and Turkey, for instance, claim to have a system of separation and proclaim a strict *laïcité* of the state. However, they are not the rule but an exception (and a detailed analysis of their respective legal systems may cast serious doubts about how real separation between state and religion is in those countries). Interestingly, most European states have adopted, explicitly or implicitly, formulas of state cooperation with religion in their constitutions and/or in their laws.⁹

⁸ For a detailed and analytical explanation of the US constitutional prohibition of establishment of religion and its judicial interpretation, see, for instance, M.W. McConnell, J.H. Harvey & T.C. Berg, *Religion and the Constitution* (3rd ed.), Aspenlaw (Wolters Kluwer), USA, 2011, pp. 121 et seq.; from a comparative perspective, see W.C. Durham & B.G. Scharffs, *Law and Religion*, Aspenlaw (Wolters Kluwer), USA, 2010, pp. 113 et seq. For a critical analysis of the judicial approach to the non-endorsement requirement derived from the establishment clause, see, among others, from different perspectives: D. Laycock, 'Nonpreferential aid to Religion: A False Claim About Original Intent', in 27 Wm. and Mary L. Rev. (1985-1986), pp. 875-923; M.W. McConnell, *Coercion: The Lost Element of Establishment*, in 27 Wm. and Mary L. Rev. (1985-1986), pp. 933-941; A.R. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, in 64 N.C. L. Rev. (1985-1986), pp. 1049-1070; J.H. Choper, *The Endorsement Test: Its Status and Desirability*, in 18 J.L. & Pol. (2002), pp. 499-536; T.C. Berg, *What's Right and Wrong with 'No Endorsement'*, in 21 Wash. U. J.L. & Pol'y (2006), pp. 307-322.

⁹ For a succinct explanation of the relations between state and religion in the EU countries, see *State and Church in Europe* (ed. by G. Robbers) (2nd. ed.), Nomos, Baden-Baden, 2005. More detailed studies analysing concrete aspects of law and religion in EU states can be found, for example, in the publications mentioned in the Internet pages of the European Consortium for Church and

Contrary to what occurs in the US, from a pan-European perspective (i.e., from the perspective of the ECHR) neither cooperation with religion nor endorsement of religion is a problem per se. Not even the remaining systems of established churches are as such incompatible with the ECHR. One may think that those systems are the product of particular historical circumstances, and are not perhaps the best choice in contemporary times, but they are compatible with the ECHR. From a pan-European perspective, the crucial question with regard to the systems of cooperation, endorsement or establishment – as well as to systems of separation – is to guarantee that they respect religious freedom and the equality principle. What the ECHR does not allow is that constitutional choices degenerate, in practice, into a repressive or discriminatory legal framework, in which, for instance, persons not belonging to the privileged religion or religions actually suffer discrimination in the exercise of their freedom of religion and belief.

This, precisely, helps us define in positive terms the European notion of state religious neutrality. Taking into account that the ECHR is not aimed at imposing a uniform model of church-state relations but at guaranteeing fundamental rights, neutrality has to be conceived as a distinctive feature of European states that constitutes a necessary requirement to adequately protect freedom of thought, conscience and religion (art. 9 ECHR) and non-discrimination on religious grounds (art. 14 ECHR). The protection of freedom of religion and belief of all individuals and groups, and not the model of church-state relations, is the point of reference to understand the common meaning of state neutrality in Europe.

In this respect, the case law of the ECtHR permits us to infer the *two main coordinates that define the notion of state neutrality*.

State Research: <http://www.churchstate.eu/Publications> (accessed 26 October 2013). Interesting data and analysis can also be found in *Religion and the Secular State: Interim Reports* (ed. by J. Martínez-Torrón & W.C. Durham), prepared for the XVIIIth International Congress of Comparative Law – text available in: http://www.iclrs.org/index.php?blurb_id=975 (accessed 26 October 2013). More detailed studies and law and religion on different world countries (not only in Europe) are gradually appearing in the *International Encyclopaedia of Laws* published by Wolters-Kluwer; see <http://www.ielaws.com/religion.htm> (accessed 26 October 2013).

One is *impartiality* vis-à-vis religions or beliefs. This applies especially to religious differences or disputes. A number of judgments of the ECtHR relating to internal religious disputes (with regard, in particular, to the appointment of religious leaders or to religious splits) signal that the state cannot take sides in those matters and must act as an impartial arbiter or organizer. When facing the social tension that is occasionally created by competing religious groups, the role of national authorities is not to determine which party is right or wrong, or to eliminate pluralism as the price to guarantee social peace. The state's function is rather to organize religious pluralism in a way that ensures that all individuals are free to practice their religion, that diverging groups respect each other, and that all groups are as autonomous as possible to take care of their own internal affairs without undue external interferences. Thus, the Court has affirmed that the States exceed their power when they fail to remain neutral with regard to changes in the leadership of a religious community, when they try to force the community to come together under a unified leadership against its own wishes, or when they attempt to prevent a schism in a church for dissensions of religious nature.¹⁰

However, formal impartiality is not sufficient. Deeply understood, state impartiality must be based on a second coordinate: the *incompetence* of the state to judge the truth or falsity of religious doctrines, and more generally to have any judgment on strictly religious issues. In this respect, it is important to conceive *stricto sensu* the state's incompetence on religious matters. It is not that the state decides to renounce one of its legitimate competences for the sake of achieving a higher level of religious freedom. It is more than that. State neutrality implies that strictly religious issues are not part of its legitimate competences, and therefore any interference in such issues would be,

¹⁰ See, especially, *Serif v. Greece*, 14 December 1999; *Hasan and Chaush v. Bulgaria*, 26 October 2000; *Agga v. Greece*, 17 October 2002; *Supreme Holy Council of the Muslim Community v. Bulgaria*, 16 December 2004 (which refer to public authorities' intervention in leadership disputes within Muslim communities); and *Metropolitan Church of Bessarabia v. Moldova*, 13 December 2001; *Svyato-Mykhaylivska Parafiya v. Ukraine*, 14 September 2007 (which refer to public authorities' refusal to register Orthodox religious communities formed out of a split from other Orthodox church).

ipso facto and *ipso iure*, an unjustified limitation on the religious freedom of individuals and groups. The state cannot say which religion is better or worse, or which religious leader is more or less appropriate for a religious group, because it lacks all legitimate competence on those issues.¹¹

Nevertheless, it is also important to note that this notion of neutrality does not imply that public authorities must – or can – be indifferent towards the results produced by the exercise of freedom of religion or belief, or that they ignore completely the content of personal choices in this particular area of human rationality. While neutrality vetoes state judgments on strictly religious issues or doctrines, it does not preclude state action with respect to religion, which may be based on other judgments. In particular, the state may take into account the social effects of the religious activity, or the predictable effects of religious moral doctrines, including the situations in which those effects conflict with the law or with values that the legal system considers essential (consider, for instance, the case of religious groups that assert their intention to impose their doctrines through violence if necessary, or that preach violence or discrimination against some people).¹²

¹¹ The notion of neutrality as state incompetence on religious matters may raise some important questions with respect to European states that have established churches. Certainly, as already indicated, the ECtHR has always understood that the ECHR is compatible with such models of church-state relations. Two interrelated reasons seem to justify such compatibility. One is the fact that those systems of established churches must be understood in the light of the particular history of the country; it would probably be incomprehensible, from the perspective of current European standards, to constitute such systems now, *ex novo*. The second reason is that, in practice, there is a high degree of protection of religious freedom of individuals and groups in those countries, and the state put a serious effort in preventing the system of established church resulting in the discrimination of religious or belief minorities.

¹² Those factors were decisive in the ECtHR's judgment on the case *Refah Partisi and others v. Turkey*, 31 July 2001 (chamber) and 13 February 2003 (Grand Chamber), as well as in the decision *Kalifatstaat v. Germany* (decision on the admissibility of Appl. No. 13828/04), 11 December 2006. The former involved the dissolution of a large party of Islamic orientation by the Turkish Constitutional Court. The latter referred to the illegalization of an Islamic association by German authorities. For a comment on *Refah Partisi*, which is

Two important consequences derive from the foregoing. First, state action with regard to religion shall and must be, for the most part, a legal action – i.e., an action precisely defined by law, with narrow margin for public authorities' discretion that could lead in practice to value judgments on religious doctrines or customs. Second, neutrality implies recognition of the reciprocal autonomy of state and religion; therefore, state interference with religious autonomy must be reduced to a minimum and its necessity must be clearly justified.¹³ We must keep in mind that, as indicated above, neutrality is conceived not as an aim in itself but as a means to guarantee and facilitate the exercise of freedom of religion or belief by all individuals and groups on equal grounds.

State Neutrality and Display of Religious Symbols in Public Places or Institutions.

With the background of this conceptual approach to state neutrality, we can now turn back to the question of religious symbols, well illustrated by the issue of the crucifix in public schools, which has been the subject of a heated debate in some European countries since the mid 1990s.¹⁴

one of the most significant judgments of the ECtHR on the dissolution of political parties, see C. Evans & C.A. Thomas, *Church-State Relations in the European Court of Human Rights*, in *BYU L. Rev.* (2006), pp. 709-713; and the chapters written, respectively, by A.E. Mayer, C. Moe, J. Gadirov & L. Lehnhof in the volume *Islam, Europe and Emerging Legal Issues* (ed. by W.C. Durham, R. Torfs, D.M. Kirkham & C. Scott), Ashgate, Aldershot, 2012), pp. 209 et seq.

¹³ The ECtHR has often emphasized this idea since the late 1990s. See, especially, the judgments cited supra, in note 10. However, in practice defining the limits of religious autonomy is far from easy, as demonstrated by some ECtHR's cases of the last years concerning the labour relations between churches and their employees. See, for example, *Obst v. Germany* and *Schüth v. Germany*, both of 23 September 2010; see also *Fernandez Martinez v. Spain*, 15 May 2012 (currently on appeal before the Grand Chamber). For an interesting comment on this type of cases and on which should be the right way to deal with them from the ECHR perspective, when the German cases had not yet been decided by the European Court, see G. Robbers, *Church Autonomy in the European Court of Human Rights: Recent Developments in Germany*, in 26 *Journal of Law and Religion* (2010-2011), pp. 281-320.

¹⁴ See, for further details and references, in the context of analogous debates in other European and American countries, R. NavarroValls & J. Martínez-Torrón, *Conflictos entre conciencia y ley...*, cited in note 3, pp. 374-393. For a

If the religious neutrality of the state is – from a pan-European perspective – intimately and inextricably linked to the protection of freedom of religion or belief, it follows that the display of religious symbols in public places or institutions is not, per se, contrary to art. 9 of the European Convention of Human Rights, as far as individuals are not subject to *coercion or indoctrination*.¹⁵

I mean this in the strictest possible sense, and therefore I must add two nuances.

First, a constitutional court may consider that the display of religious symbols in some public institutions – for example, educational centres, courtrooms, legislatures or town halls – is contrary to the constitutional principles that define the relations between state and religion in its country. However, the ECtHR is not competent to adjudicate on such principles, this is the exclusive realm of national courts. As indicated above, the aim of the European Convention is – and always was – to protect freedoms and not to impose constitutional church-state models.

Second, I am not discussing here if the display of religious symbols in public places or institutions is good or bad in order to foster mutual respect and understanding between religions and beliefs in a plural setting. Such discussion, taken seriously, would lead to numerous distinctions (including different types of public places or institutions, as well as different national contexts). It would also require analysing complex questions that are far from the purpose of this paper. My point is that, *in the absence of coercion or indoctrination*, it is not for the courts – and even less for the ECtHR – to make choices with regard to the display of religious symbols in the public sphere. Within the democratic process, the decision about such displays is the domain of

useful source of documentation on the issue of the crucifix in Italy, with interesting scholarly analysis from diverse perspectives, see *La questione del 'crocifisso'* (ed. by A.G. Chizzoniti), in the website *Osservatorio delle libertà ed istituzioni religiose*: <http://www.olir.it/areetematiche/75/index.php> (accessed 26 October 2013).

¹⁵ The coercive factor was present, for example, in the case *Buscarini and others v. San Marino*, 18 February 1999, in which the Court held that requiring newly elected members of Parliament to swear allegiance to the Constitution on the Gospels, on pain of forfeiting their parliamentary seats, was contrary to the provisions of Art. 9 ECHR.

public policies and hence the competence of other authorities. Those decisions involve questions not susceptible of easy answers. Often they are taken at the local level. Tradition plays a role, and certainly installing a religious symbol *ex novo* is not the same as keeping it in the place where it had been for ages; in a European context of religious traditions influencing the shaping of the public sphere, both keeping and removing a symbol have a meaning, neither of which can be ignored. One-sided views are normally unfair and public authorities must take into account a plurality of interests. In any event, the function of the courts is not to substitute for the competent authorities on this type of issues. They must limit themselves to be vigilant and ensure that no rights are violated by decisions adopted by the legitimate authorities. And, of course, if they find a violation of religious freedom, they must provide the relevant evidence.

The mistake of the ECtHR in the chamber judgment in the *Lautsi* case (*Lautsi I*)¹⁶ was, precisely, to take for granted that the mere display of a traditional religious symbol in Italy – the crucifix – was a violation of the religious freedom of the students opposing to it and of the parents' rights under article 2 of the First Protocol to the ECHR.¹⁷ For the Court,

¹⁶ *Lautsi v. Italy*, 3 November 2009. Among the immense legal literature generated by this case, see, from different perspectives, and with reference to the chamber's judgment, P. Annicchino, *Is the glass half empty or half full? Lautsi v. Italy before the European Court of Human Rights*, in Stato, Chiese e Pluralismo confessionale (May 2010), pp. 1-19 (www.statoechiese.it); S. Cañamares Arribas, *La cruz de Estrasburgo. en torno a la sentencia Lautsi v. Italia, del Tribunal Europeo de Derechos Humanos*, in 22 Revista General de Derecho Canónico y Derecho Eclesiástico (2010), pp. 1-13; N. Colaïanni, *Il crocifisso in giro per l'Europa: da Roma a Strasburgo (e ritorno)*, in 24 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado (2010), pp. 1-26; S. Mückl, *Crucifijos en las aulas: ¿lesión a los derechos fundamentales?*, in 23 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado (2010), pp. 1-15 (comparing *Lautsi* with the case law of the German Federal Constitutional Law); D. Ranieri, *Notable reacción europea ante otro intento laicista. El crucifijo en las escuelas italianas y la Corte de Estrasburgo*, in 68-69 Prudentia Iuris (2010), pp. 247-280; H.H. Weiler, *Crucifix in the Classroom Redux*, in 21-1 European Journal of International Law (2010), pp. 1-6.

¹⁷ This is the text of Art. 2 of the Protocol to the ECHR: 'No person shall be denied the right to education. In the exercise of any functions which it assumes

the crucifix was a ‘powerful’ symbol with remarkable potential impact on young students, and with a primarily religious meaning. Therefore, its presence in the school premises could be emotionally disturbing for some students and was restrictive of the parents’ rights to decide the orientation of their children’s education and incompatible with the neutrality that must preside the public school environment.¹⁸ Naturally, the logical consequence of this rationale would be the removal of crucifixes from all public schools in Italy (and probably elsewhere). Implicit in that approach was a notion of neutrality as *exclusion of religion* from the public space, at least in the educational milieu. Such understanding of neutrality is, of course, a legitimate option but it is not the only legitimate option, and it is not for the courts – even less for the ECtHR – to impose their own choices on such a delicate issue.

Ultimately, by making mandatory the exclusive concept of religious neutrality, *Lautsi I* axiomatically accepted a very debatable distinction between believers and non-believers, attaching the latter to the realm of reason and the former to the realm of non-rational belief. From this departure point, the logical corollary was that the particular symbols of a religion did not have a place in the sphere of public education. In this respect, it is interesting to note that a substantial part of the rationale of *Lautsi I* replicates the ECtHR’s argument in *Leyla Şahin* and other cases that adopt a similar approach with regard to the wearing of an

in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’ As is well known, the *Lautsi* case is a result of a heated public and legal debate in Italy in the last decade about the display of the crucifix in public schools’ classrooms. The applicant was the mother of two students of a public school (aged 13 and 11 at the time), who unsuccessfully had asked the school’s governors to remove crucifixes from classrooms – the Italian law prescribes that there shall be a crucifix on the wall of public schools classrooms. The mother claimed that the presence of that religious symbol was against the constitutional principle of secularity (*laicità*), in which she wished to educate her children. A chamber of the ECtHR decided unanimously in favour of the applicant, considering that there had been a violation of Article 2 of the First Protocol to the Convention in connection with Article 9 ECHR. The judgment was reversed on appeal by the ECtHR’s Grand Chamber.

¹⁸ See especially *Lautsi I*, ¶ 57.

Islamic headscarf or other personal clothing of religious significance.¹⁹ One of the reasons utilized to support the states' restrictive policies on personal religious garments at school was that such expressions of religiosity could lead to tension or 'pressure' on other students.

In my opinion, *Lautsi I*, like the ECtHR's decisions on Islamic headscarf cases, transmit the implicit message that imposing the absence of religious visible elements, at least in public schools, is a necessary consequence of state neutrality as guarantee of freedom of thought, conscience and religion. The underlying assumption appears to be that religion is a factor of potential conflicts, and perhaps provocation, leading easily to confrontation and social tension. Hence the best choice would be to eliminate its visible features, and state neutrality would require the protection of the individual right to build 'uncontaminated' educational environments free from religion. From

¹⁹ See *Leyla Şahin v. Turkey*, 29 June 2004 (chamber's decision), and *Leyla Şahin v. Turkey*, 10 November 2005 (Grand Chamber's decision). For some comments on this case, among the immense legal literature it has generated, see the chapters written, respectively, by T.J. Gunn, N. Hostmaelingen, T. Lindholm, J. Martínez-Torrón & I.T. Plesner in the volume *Islam, Europe and Emerging Legal Issues*, cited in note 12; N. Lerner, *How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance*, in 13 *Willamette Journal of International Law and Dispute Resolutions* (2005), pp. 65-85; B. Chelini-Pont & E. Tawil, *Brèves remarques sur l'arrêt Leyla Şahin*, in 2 *Annuaire Droit e Religions* (2006-2007), pp. 607-611. Other important cases related to Islamic headscarves or analogous religious clothing are: *Dogru c. Francia*, and *Kervanci c. Francia*, both of 4 December 2008; *Dahlab v. Switzerland*, decision on the admissibility of Appl. No. 42393/98, 15 February 2001; *Köse and 93 other applicants v. Turkey*, decision on the admissibility of Appl. No. 26625/02, 24 January 2006; *Kurtulmus v. Turkey*, decision on the admissibility of App. No. 65500/01, 24 January 2006; and six almost identical decisions of inadmissibility of 30 June 2009: *Aktas v. France*, Appl. No. 43563/08, *Bayrak v. France*, Appl. No. 14308/08, *Gamaleddyn v. France*, Appl. No. 18527/08; *Ghazal v. France*, Appl. No. 29134/08, *Jasvir Singh v. France*, Appl. No. 25463/08, and *Ranjit Singh v. France*, Appl. No. 27561/08 (the six decisions involved applications by students punished in application of the 2004 French law that prohibits 'visible' personal religious symbols in public schools: four of them were female Muslims wearing a hijab and two of them were male Sikhs wearing a *keski*, which is a more discreet garb usually worn under the turban characteristic of Sikhs).

such a perspective, the state would become obliged to eliminate the possibility of conflict by prohibiting every visible religious symbol (when in reality conflicts and confrontation are normally produced not by religious symbols but rather by those who assert their absolute right to erase those symbols from their sight, so that they are not exposed to its presence or alleged influence). One of the predictable results of this position is that in practice non-religious ideas enjoy a superior position over religious ideas. In other words, it could lead to a design of public spaces in which an atheist can feel more comfortable than a religious believer.²⁰

At the same time, it is not easy to understand how such a conception of state neutrality, with respect both to personal and to institutional symbols, can contribute to build the pluralist, inclusive and objective educational environment that *Lautsi I* mentions.²¹ Indeed, the effect of eliminating the visibility of the religious is to exclude and hide an important part of pluralism as well as to create a fictitious school setting, separated from the complexities of real life.²² Such a school setting would not be indeed neutral, for it may transmit the subliminal message that religion, being potentially conflictive, has its place out of the school but not inside it (with the implication that atheism and agnosticism are in the opposite end of the spectrum, i.e., are considered as non-conflictive ideas, and therefore ‘acceptable’ at school).

Fortunately, the Grand Chamber of the ECtHR overruled the chamber’s decision one and a half years later (*Lautsi II*).²³ In *Lautsi II*, the Court rejected the idea that the exclusive notion of neutrality proposed by the

²⁰ See R. Puza, *La Cour constitutionnelle, la Bavière et le crucifix dans les Écoles*, in 45 *Revue de droit canonique* (1995), pp. 373 ss., commenting the 1995 decision of the German Federal Constitutional Court on the crucifix in public schools in Bavaria.

²¹ See *Lautsi I*, B 47.c).

²² See in this regard M.D. Evans, *Manual on the wearing of religious symbols in public areas*, Council of Europe-Martinus Nijhoff, Leiden, 2008, especially pp. 59 et seq. and 89 et seq.

²³ *Lautsi v. Italy* (Grand Chamber), 18 March 2011. The *Lautsi* case has been – and keeps being – commented on by scholars from very diverse positions. See, among Italian scholars, after the Grand Chamber’s decision, and from different perspectives, V. Turchi, *La pronuncia della Grande Chambre della Corte di*

chamber was the only acceptable one, and pointed out that neutrality could also be achieved by a school environment that is inclusive and therefore open to visible expressions of both majority and minority religions or worldviews.²⁴ According to the Grand Chamber, the decision about the presence of religious symbols in public schools falls within the State margin of appreciation. The Court was not expressing agreement (or disagreement) with the Italian government or with the Italian law on crucifixes in public schools. Its only function was to determine if there had been a violation of religious freedom. The ECtHR concluded that Italy was entitled to choose its own symbols and that, in the absence of coercion, intolerance or indoctrination of persons thinking differently, the Court cannot interfere with choices legitimately adopted in accordance with the Italian democratic legislative process.

Should Religious Minorities be empowered to Re-Shape the Public Sphere?

Together with the meaning of the religious neutrality of the state, the

Strasburgo sul caso Lautsi C. Italia: post nubila Phoebus, in *Stato, Chiese e pluralismo confessionale* (October 2011), where further bibliographical references, especially to Italian legal literature, can be found; and P. Ronchi, *Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in Lautsi v Italy*, in 13 *Ecclesiastical Law Journal* (2011), pp. 287-297. See also, comparing the Strasbourg and the US approach to institutional religious symbols, J. Witte, Jr. & N.L. Arold, *'Lift High the Cross'? Contrasting the New European and American Cases on Religious Symbols on Government Property*, in 25 *Emory Int'l L. Rev.* (2011), pp. 5-55; and a critical view of *Lautsi II*, in the light of Canadian law and putting the European case law into a socio-cultural perspective, L. Beaman, *Battles over Symbols: The 'Religion' of the Minority versus the 'Culture' of the Majority*, in 28 *The Journal of Law and Religion* (2012-2013), pp. 67 et seq.. In Spain, see I. Martín Sánchez, *El caso Lautsi ante el Tribunal Europeo de Derechos Humanos*, in 28 *Anuario de Derecho Eclesiástico del Estado* (2012), pp. 215-252; S. Cañamares Arribas, *Los símbolos religiosos en el espacio público: entre la amenaza real y la mera sospecha*, in 20 *El Cronista del Estado Social y Democrático de Derecho* (April 2011), pp. 60-67; S. Meseguer Velasco, *Símbolos religiosos en colegios públicos: ¿hacia dónde camina la jurisprudencia europea?*, in 5 *Anuario Jurídico Villanueva* (2011), pp. 202-213.

²⁴ See especially *Lautsi II*, §74.

main question present in *Lautsi* was whether religious minorities – or individuals – have the right to re-shape the public sphere when they feel offended by the display of the symbols that express the beliefs – or just the traditions – of the religious majority, with which they profoundly disagree.

The response of *Lautsi I* was affirmative,²⁵ and the chamber categorically assumed that, in a public school, students' freedom of religion or belief implies a negative dimension consisting in their right not to be 'exposed' to the presence of a religious symbol that some may find alien or even offensive. The argument was analogous to that used in the Islamic headscarf cases (which not coincidentally are often cited in that decision); i.e., religious symbols must be avoided in the public school environment because of the hypothetical pressure they must cause on the students disagreeing with or opposing to the meaning of those symbols.

This argument does not seem very persuasive, taking into account the 'static' or 'passive' symbol of the crucifix and the absence – as in the case of Islamic headscarf – of any proselytizing intention or effect.²⁶ There was no evidence at all that the presence of that Christian symbol was utilized in practice to affirm the 'superiority' of the majority religion in Italy, to indoctrinate students or to foster conversions. On the other hand, the chamber's reasoning seems also in contradiction with the previous case law of the ECtHR that held – in my view with all good reason – that the religious freedom of the believers of a certain religion – be it a majority or minority religion – does not confer on them the right to be exempt from criticism or to be free from the influence of contrary or even hostile ideas.²⁷

Those holdings of the chamber were corrected by the Grand Chamber in *Lautsi II*, with which I essentially agree. The Court noted that the mere display of a crucifix in classrooms, as a sign of the religion of the

²⁵ See *Lautsi I*, BB 53-55.

²⁶ See in this regard, the essays, cited in note 16, written by S. Cañameres Arribas, pp. 6-7, and S. Mckl, pp. 8-10.

²⁷ See *Otto-Preminger-Institut v. Austria*, 20 September 1994, B 47. See, for further references and bibliography, J. Martínez-Torrón, *Freedom of Expression versus Freedom of Religion in the European Court of human Rights*, in

majority of the Italian population, was not sufficient to conclude that there was a process of indoctrination, and even less taking into account that the Italian school environment was open to practices and visible expressions of other minority religions; for instance, students could freely wear Islamic headscarves, and optional religious instruction in creeds other than Catholic could be organized at school.²⁸ Briefly but clearly, the ECtHR held that the subjective feeling of some students about the crucifix was not in itself sufficient to establish a breach of the European Convention and to challenge the legitimacy of a school setting that was objectively built according to an open and inclusive concept of neutrality.²⁹

In my opinion, *Lautsi II* would have been even better if it had elaborated on some points remarked in the concurring opinions of two judges. On the one hand, it would have been useful if the Court had made it clearer that the value protected by the Convention is religious freedom and not secularity, notwithstanding how legitimate and traditional may the latter be in some European States.³⁰ As indicated above in this paper, strict separation between state and religion is not included in the ECHR, but only the state neutrality conceived as a condition for the respect for religious freedom. On the other hand, the Court could have developed the idea that coercion should be the test for a violation of freedom of religion or belief, and not the subjective feeling of offence experienced by some persons in the presence of some religious symbols. Just as religious believers do not have the right to be

‘Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World’ (ed. by A. Sajó), Eleven, The Netherlands, 2007, especially pp. 238-239. With this same orientation, the German Federal Constitutional Court, in 2003, rejected the claim of a father demanding that the table blessing in the local elementary school attended by his son had to be discontinued, for he was an atheist and those prayers violated his ideological freedom. Among other things, the German Court affirmed: ‘it is not unconstitutional that all children, including those with parents of atheistic convictions, know since their childhood that there are in society people with religious beliefs that wish to practice their beliefs’. See BVerfGE, 1BvR 1522/03 vom 2.10.2003, Absatz-Nr. (1-11).

²⁸ See especially *Lautsi II*, §§ 70-72, 74.

²⁹ See especially *Lautsi II*, § 66.

³⁰ Cf. concurring opinion of Judge Bonello.

free from criticism, atheistic believers do not have the right to be free from exposure to symbols – personal or institutional – that may offend their convictions or feelings.³¹

Such a development would have been helpful to counteract the curious rationale of the chamber in *Lautsi I*, focused on the (often hypothetical) subjective feelings of individuals. According to the chamber, religious symbols would not have a place in a public school because they could generate in the students the perception that they are brought up in a milieu marked by a particular religion – allegedly, this religion would be perceived as the state's favourite, which would be 'emotionally disturbing for pupils of other religions or those who profess no religion'.³² Such juridical reasoning centred on emotions and subjectivity is, in my view, a slippery surface, not exempt from risks and imprecisions, which reminds of the questionable criterion of the 'reasonable observer' created by the US Supreme Court.³³

On the one hand, *Lautsi I* took for granted that the presence of the symbol could 'objectively' cause 'emotional disturbance' to students that do not share the belief of the majority. However, the reality is that each person has, towards religious symbols, diverse (and mutable) feelings and reactions. Indeed, the vast majority of people with atheistic or agnostic beliefs do not express any objection against religious symbols. Their usual reaction is indifference, sometimes accompanied

³¹ See concurring opinion of Judge Power.

³² See *Lautsi I*, §§ 54-55. A similar stance was adopted by a first instance court in Spain in 2008, when a 'secular cultural association' of the city of Valladolid required that the school board remove crucifixes from all common areas of the school. The main argument utilized by the court was that the display of religious symbols in an educational centre attended by minors could generate in the students the 'feeling' that the state is 'closer' to the Christian religion than to other worldviews (Juzgado de lo Contencioso-Administrativo N° 2, sentencia n° 288/2008, 14 November 2008). I must note that in Spain there is no law comparable to the Italian law on crucifixes. No provision obliges public schools to place crucifixes or any other religious symbols in classrooms or other school areas. However, the school board can take that decision. In practice, there are no religious symbols in most public schools in Spain, although in some of the oldest ones – where crucifixes used to be displayed – they have been kept out of respect for the school tradition.

³³ See, among others, the bibliography cited in note 8.

by their respect for the beliefs of others and by their realization that they are often a minority in a place in which the majority belief is other (which is not a negative fact in itself, provided that public authorities ensure that minorities are not discriminated in practice). Seldom do people articulate their atheism or agnosticism as intolerance of the presence of visible objects that symbolize religious ideas that they hate, despise or simply consider false.

On the other hand, we should apply to this issue the same criteria that are applicable to the cases in which people, in the use of their freedom of expression, use a language that is offensive to the religious sentiments of other people.³⁴ Law does not immunize individuals against mere offence. Law protects freedoms and rights, but not feelings or emotions. Law must be based on facts and on objective criteria, and feelings are, by nature, subjective and variable. Therefore, in order to determine whether the display of a religious symbol violates the religious freedom of those opposing the symbol, the test should be aimed at identifying the possible existence of coercion or indoctrination – which is another form of coercion – and not on the subjective feeling of offence alleged by dissenters.³⁵ If a court could grant to opponents of a religious symbol of majoritarian support the right to eliminate the visibility of such symbols, it would be empowering those people to impose their will, and their notion of ‘educational habitat’, on the majority.

Does the foregoing entail that, from the perspective of the European

³⁴ See, on this topic, J. Martínez-Torrón, *Freedom of Expression versus Freedom of Religion in the European Court of human Rights*, ‘Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World’ (ed. by A. Sajó), Eleven, The Netherlands, 2007, pp. 233-269.

³⁵ As the concurring opinion of Judge Power in *Lautsi II* put it: ‘The test of a violation under Article 9 is not ‘offence’ but ‘coercion’. That article does not create a right not to be offended by the manifestation of the religious beliefs of others even where those beliefs are given ‘preponderant visibility’ by the State. The display of a religious symbol does not compel or coerce an individual to do or to refrain from doing anything. It does not require engagement in any activity though it may, conceivably, invite or stimulate discussion and an open exchange of views. It does not prevent an individual from following his or her own conscience nor does it make it unfeasible for such a person to manifest his or her own religious beliefs and ideas’.

Convention on Human Rights, minorities, or individuals, are bound to respect the majority decisions concerning the display of religious symbols in public places? My answer is definitely affirmative, as far as there is no coercion or indoctrination attached to such display – such would be the case, for instance, when a specific act of reverence or worship is required,³⁶ or when those religious symbols are used to promote intolerance or discrimination of dissenters, be they atheists, agnostics or believers of other religions. Religion, and its symbols, are part of the culture and should be treated as such – which is not the same as affirming that the crucifix is a cultural symbol, as the Italian Council of State did.³⁷

The Position of Spanish and German Courts

This, indeed, has been the predominant line of reasoning in the Spanish jurisprudence, which has been very open to the maintenance of religious traditions in public places or institutions, and at the same time very firm in proclaiming that no person can be obliged to take an active part in those traditions.³⁸

Thus, the Spanish Constitutional Court has held that state neutrality is compatible with the presence of Christian symbols in public corporations, as far as they are linked to the history of the institution and imply neither the adherence of the state to a particular creed nor

³⁶ Such was the situation in *Buscarini*, cited in note 15.

³⁷ See Consiglio di Stato - Sez. VI. Sentenza n. 556/2006, 13 February 2006.

³⁸ Among the Spanish legal literature on these issues, see S. Cañameres Arribas, *Tratamiento de la simbología religiosa en el Derecho español: propuestas ante la reforma de la Ley orgánica de libertad religiosa*, in 19 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* (2009), pp. 1-29; A. González-Varas Ibáñez, *Los actos religiosos en las escuelas públicas en el derecho español y comparado*, in 19 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* (2009), pp. 1-28; G. Moreno Botella, *Crucifijo y escuela en España*, in 2 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* (2003), pp. 1-34. See also I. Briones, *Los símbolos religiosos como signos de identidad y de discordia. De la libertad de conciencia y de expresión del individuo a las tradiciones religiosas de un pueblo*; L. Martín-Retortillo, *Símbolos religiosos en actos y espacios institucionales*; and A. Ollero, *Símbolos religiosos, poder, razón: una reflexión político-jurídica*; all of them in 28 *Anuario de Derecho Eclesiástico del Estado* (2012).

any coercion on the religious freedom of individuals. For instance, the Court has found nothing unconstitutional in the fact that a military garrison organized a solemn parade in honour of the local advocacy of the Holy Virgin,³⁹ or in the fact that a unit of the National Police participated in a religious procession during the celebration of the Catholic Holy Week – not to guarantee the safety of the event but in its quality of a member of the relevant religious fraternity, with police officers wearing their gala uniforms.⁴⁰ However, the Court has made clear that no officer can be obliged to be present in those religious ceremonies against his personal convictions, for public events reflecting a religious tradition must be reconciled with the individuals' freedom of conscience.

For analogous reasons, the Constitutional Court held that it would have been legitimate for the University of Valencia – a public University – to keep an image of the Holy Virgin that had been traditionally present in its coat of arms, if the University governing bodies had so decided.⁴¹ And, more recently, the Court has sustained the constitutionality of the statutes of the Bar Association of Seville, which have kept, as 'a secular tradition', the Immaculate Conception of the Holy Virgin as its honorary patron.⁴² The Court noted that, the Bar Association being itself aconfessional, preserving this tradition does not infringe either the neutrality of public institutions or the religious freedom of non-Christians. The Court added that symbols reflect the history of institutions, and it is natural to find in the Spanish culture plenty of symbols, with religious connotations, that represent public institutions. Furthermore, the Court observed that in contemporary societies passive

³⁹ See STC 177/1996.

⁴⁰ See STC 101/2004.

⁴¹ See STC 130/1991. In this case, the supreme governing body of the University had decided the opposite, i.e., to remove the image of the Virgin from the coat of arms. See J. Martínez-Torrón, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, in *BYU L. Rev.* (2001), pp. 720-724; S. Cañamares Arribas, *Religious Symbols in Spain: A Legal Perspective*, in *11 Ecclesiastical Law Journal* (2009), pp. 189-191.

⁴² See STC 34/2011. See T. Prieto Álvarez, *Colegios profesionales, aconfesionalidad y patronazgo religioso. Comentario a la STC de 28 de marzo de 2011*, in *79 Revista Andaluza de Administración Pública* (2011), pp. 137-156.

symbols have virtually no influence on people's beliefs and, therefore, the religious freedom of individuals is safe, provided that no one is compelled to participate in rites or ceremonies in honour of those symbols. In the absence of such coercion – the Court concluded – the mere subjective perception of offence is not sufficient to appreciate that freedom of ideology or religion has been violated.

A comparable position was adopted by the Superior Court of Justice of Valencia in 2011,⁴³ when it refused to decree the removal of a huge cross placed on a mountain since the eighteenth century and rebuilt several times by popular initiative. The Court declared that 'in our country, as in many others of similar cultural and religious traditions..., there is a visible presence of religious symbols in public places ...; their maintenance is just a manifestation of respect for those traditions and not an imposition of particular religious beliefs, and therefore they cannot be understood as expressing intolerance of non-believers'.⁴⁴

Another interesting case – widely spread by the media – concerning the presence of the crucifix in a public space, and more precisely in the city hall of Saragossa, was decided in 2010 by a court of first instance.⁴⁵ A group of left-wing councilmen demanded that the mayor should order the removal of an old crucifix from the plenary hall, where the city council meetings were usually held. The mayor – of the Socialist Party – refused to remove the crucifix, making reference to its historical and artistic value as well as to the significance of respect for traditions – that the particular crucifix was linked to the life of the Saragossa's city council since the 17th century. The issue was put to a vote and the majority of the council decided in favour of keeping the crucifix. The court of first instance confirmed the legitimacy of the council's decision. Interestingly, the court analysed the issue from the perspective of judicial self-restraint. For the court, the right question was not how or if the council could justify the display of a historic crucifix in the plenary hall but, on the contrary, to elucidate if there was

⁴³ STSJ Valencia 648/2011 (*Sala de lo Contencioso-Administrativo, Sección 5ª*), 6 September 2011.

⁴⁴ *Ibid.*, FJ 9.

⁴⁵ *Juzgado de lo Contencioso-Administrativo* Nr. 3 of Saragossa, Judgment Nr. 156/10, 30 April 2010.

any reason why a court must prohibit the council from having that crucifix in its plenary hall. The court did not find any reason for the prohibition, considering that the principle of secularity does not entail erasing the visibility of religion from public life, and noting that the display of the crucifix was not aimed at imposing a particular religion over other religions or beliefs – it simply reflected the history of a city council more than nine centuries old.

In the educational environment, another case that attracted considerable media attention was resolved by a decision of the Superior Court of Castile and León in 2009.⁴⁶ Its origin was a complaint about the crucifixes that hung on the classrooms of a public school in Valladolid. A cultural ‘secular’ association, following the unsuccessful request of some students’ parents to the school board, demanded that the crucifixes should be removed from all classes and common spaces of the school. The court of first instance decided in favour of the plaintiffs and ordered the immediate removal of all the crucifixes, on the ground that the display of religious symbols in an educational centre could generate in young students the ‘feeling’ that the state was ‘closer’ to the Christian religions than to other worldviews.⁴⁷ On appeal, the Superior Court partially overruled the first instance decision. On the one hand, the Court rejected – as contrary to Article 16 of the Constitution and to the case law of the Constitutional Court – any ‘maximalist’ or ‘extreme’ interpretation of the constitutional principle of secularity (*laicidad*) that prompted to erase all traces of religion from public life. On the other hand, the Court held that state neutrality obliged to take away from school those religious symbols whose presence could be ‘emotionally disturbing’ for students and contrary to the parents’ rights to have their children educated in accordance with their convictions. As a consequence, in a sort of Solomonic judgment, the Court decreed that crucifixes should be removed only from the school common areas and from those classrooms attended by students whose parents had explicitly complained about their presence; they could remain in the rest of rooms if the school board so determined. It is interesting to note

⁴⁶ STSJ Castilla y León 3250/2009 (*Sala de lo Contencioso-Administrativo, Sección 3ª*), 14 December 2009.

⁴⁷ See *Juzgado de lo Contencioso-Administrativo* Nr. 2 of Valladolid, Judgment Nr. 288/2008, 14 November 2008, FJ 4.

that the Superior Court's judgment was openly grounded on the ECtHR's decision *Lautsi I*. Had *Lautsi II* already been rendered – overruling the chamber's decision – we may conjecture that the Court might have decided differently.

In Germany, the Federal Constitutional Court has adopted a stance closer to an exclusive notion of state neutrality, although giving some margin of appreciation to the states (*Länder*) to accommodate the differing views with respect to the display of religious symbols in public schools.

One of the main conflicts was raised, two decades ago, when some students' parents challenged the Bavarian laws according to which a crucifix had to be placed on the wall of every classroom of public schools. The parents, of anthroposophical convictions, argued that they did not want their children exposed to the daily influence of a religious symbol consisting in the representation of a 'human agonizing body'. The *Bundesverfassungsgericht* declared that aspect of Bavarian law unconstitutional, in a judgment that has received numerous criticisms by German scholars.⁴⁸ Among other things, it has been noted that the alleged moral conflict of the students could have been prevented, or accommodated, in other ways which would be more appropriate in generating an atmosphere of reciprocal tolerance between diverging worldviews. For instance, the crucifix could have been removed from that particular classroom, or moved to a place in the classroom where

⁴⁸ BVerfG, 1 BvR 1087/91 vom 16.05.1995. For an analysis of this judgment and its consequences, see A. Hollerbach et al., *Das Kreuz im Widerspruch: der Kruzifix-Beschluss des Bundesverfassungsgerichts in der Kontroverse* (ed. by H. Maier), Herder, Freiburg i. Br., 1996. See also A. von Campenhausen, *Zur Kruzifix-Entscheidung des Bundesverfassungsgerichts*, in 121 *Archiv des öffentlichen Rechts* (1996), pp. 448-464; J. Isensee, *Bildersturm durch Grundrechtsinterpretation. Der Kruzifix-Beschluss des BVerfG*, in *Zeitschrift für Rechtspolitik* (1996), pp. 10 et seq.; D. Merten, *Der Kruzifix-Beschluss des Bundesverfassungsgerichts aus grundrechtsdogmatischer Sicht*, in 'Verfassungsstaatlichkeit, Festschrift für Klaus Stern zum 65. Geburtstag' (ed. by J. Burmeister), Beck, München, 1997, pp. 987 et seq.; D. Pirson, *Kruzifix in Unterrichtsräumen*, in *Bayerische Verwaltungsblätter* (1995), pp. 755-758. In Spain, see T. Prieto Álvarez, *Libertad religiosa y espacios públicos. Laicidad, pluralismo, símbolos*, Thomson-Civitas, Cizur Menor, 2010, pp. 81-88 y 126-129.

it would not be noticeable by the objector students. Indeed, such had been the practice of the Court in similar conflicts until then.⁴⁹ A few months after the judgment, the Bavarian government modified the law on public schools in order to keep the display of crucifixes in classrooms. When there is an objection by some student – or his parents – the school authorities shall seek an agreed solution to the conflict; and, if this proves to be not possible, they will endeavour to find a balance between the diverging religious and ideological convictions of the students, without losing sight of the majority position.⁵⁰

A more hesitant stance towards neutrality was adopted by the Federal Constitutional Court in the *Ludin* case, in 2003, with respect to the wearing of personal religious symbols in public schools, in particular the Islamic headscarf, or *hijab*, by a female teacher.⁵¹ The conflict was raised by a Muslim woman, born in Afghanistan and a legal resident in Germany since 1987, who had passed the public examination necessary to take the position of primary school teacher. The education authorities

⁴⁹ See G. Robbers, *Religious Freedom in Germany*, in ‘La libertad religiosa y de conciencia ante la justicia constitucional’ (ed. by J. Martínez-Torrón), Comares, Granada, 1998, pp. 203-204.

⁵⁰ Art. 7.3 of the *Bayerisches Gesetz über das Erziehungs- und Unterrichtswesen* (BayEUG): “Angesichts der geschichtlichen und kulturellen Prägung Bayerns wird in jedem Klassenraum ein Kreuz angebracht. Damit kommt der Wille zum Ausdruck, die obersten Bildungsziele der Verfassung auf der Grundlage christlicher und abendländischer Werte unter Wahrung der Glaubensfreiheit zu verwirklichen. Wird der Anbringung des Kreuzes aus ernsthaften und einsehbaren Gründen des Glaubens oder der Weltanschauung durch die Erziehungsberechtigten widersprochen, versucht die Schulleiterin bzw. der Schulleiter eine gütliche Einigung. Gelingt eine Einigung nicht, hat sie bzw. er nach Unterrichtung des Schulamts für den Einzelfall eine Regelung zu treffen, welche die Glaubensfreiheit des Widersprechenden achtet und die religiösen und weltanschaulichen Überzeugungen aller in der Klasse Betroffenen zu einem gerechten Ausgleich bringt; dabei ist auch der Wille der Mehrheit, soweit möglich, zu berücksichtigen.”

⁵¹ BVerfG, 2 BvR 1436/02 vom 3.6.2003, Absatz-Nr. (1-140). In Spain, this judgment has been analysed by M.A. Martín Vida & S. Müller-Grüne, *¿Puede una maestra portar durante las clases en una escuela pública un pañuelo en la cabeza por motivos religiosos?*, en REDCo 70 (2004), pp. 313-336; I. Briones, *El uso del velo islámico en Europa: un conflicto de libertad religiosa y de conciencia*, in 10 Anuario de Derechos Humanos - Nueva ...poca (2009), pp. 35-42; A. López-Sidro, *Breve comentario sobre la sentencia del Tribunal*

of Baden-Württemberg – one of the German *Länder* – excluded her from the possibility of having such a position at public schools, because of her firm decision to wear a *hijab* while teaching, despite the fact that she was equally determined to avoid all kinds of indoctrination or proselytism. The state authorities alleged that the Islamic headscarf was a political and religious symbol, incompatible with the neutrality that should permeate the German system of public schools. The plaintiff rejected a notion of state neutrality consisting in the eradication of visible symbols of religious or philosophical ideas, and claimed that true neutrality cannot lead to conceal from students the religious plurality actually existing in German contemporary society. Moreover, she declared that never in her teaching experience had she experienced any situation of tension with her students or with their parents for reason of her *hijab*.

A divided Court decided in favour of the plaintiff,⁵² with a reasoning that has raised some doubts among many German scholars. The Court admitted that there were constitutional rights and values – state neutrality, as well as the parents' and the students' rights – that could justify a limitation on the plaintiff's religious freedom, including her disqualification from teaching at public schools, provided that there was a sufficiently specified legal basis. According to the majority of the Court, such specific legal basis was lacking in this case, and therefore

Constitucional Federal de Alemania, de 24 de septiembre de 2003 (2 ByR 1436/02), sobre el velo islámico de una profesora en centro escolar público, in 3 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado (2003), pp. 1-3; J. Rossell, *La cuestión del velo islámico y la vestimenta religiosa en la República Federal de Alemania*, in 'El pañuelo islámico en Europa' (ed. by A. Motilla), Marcial Pons, Madrid, 2009, pp. 187-193. Among German legal literature, see G. Robbers, 'Muslimische Lehrerinnen, das Kopftuch und das deutsche Bundesverfassungsgericht', in 50 Österreichisches Archiv für Recht & Religion (2003), pp. 405-417; S. Muckel, *Der Islam im Staatskirchenrecht des Bundesrepublik Deutschland*, in 'Religionsfreiheit als Leitbild. Staatskirchenrecht in Deutschland und Europa im Prozess der Reform' (ed. by H. Kress), Lit, Münster, 2004, pp. 119-139; J. Bader, *Cuius regio, eius religio - Wessen Land, dessen Religion*, in 43 Neue Juristische Wochenschrift (2004), pp. 3092-3094; and, before the Constitutional Court's judgment, S. Muckel, *Religionsfreiheit und Sonderstatusverhältnisse - Kopftuchverbot für Lehrerinnen?*, in 40 Der Staat (2001), pp. 96-127.

⁵² The decision was taken by five votes to three.

a sole 'abstract danger' for those other legal interests was not sufficient to justify a restriction on a constitutional right. The Constitutional Court emphasized three points. First, there are legal interests that undoubtedly can support imposing on teachers of public schools a prohibition from wearing a *hijab*. Second, those interests must be grounded on a specific legislative provision. And third, the states (*Länder*), by virtue of their competences on education, can enact laws that prohibit teachers from wearing personal religious symbols at school. For the Court, the states are free to legislate on such a sensitive issue in an increasingly plural society, for plurality is positive as far as it facilitates tolerance and open-mindedness, but may have some problematic aspects and constitute a potential source of conflicts.

A number of German states understood the *Ludin* judgment as an invitation to legislate on the issue as they considered appropriate, beginning by Baden-Württemberg, which modified its law on education six months after the judgment⁵³ in order to forbid every external expression by teachers that could harm the state neutrality vis-à-vis the students or their parents. In particular, the law prohibits all behaviour that may lead to conclude that a teacher is violating human dignity, the equality of rights, fundamental rights or democratic order. Until now, eight out of sixteen *Länder* have enacted laws on this matter, with diverse nuances.⁵⁴ Experience, however, demonstrates that this legislation will not necessarily end judicial conflicts on the issue of Islamic headscarves, where sometimes plaintiffs demand equal treatment with Catholic nuns who are permitted to wear their habits while teaching.⁵⁵

⁵³ More precisely, Art. 38 of its Law on Schools (*Schulgesetz*). See A. Torres, *Neutralidad del Estado y empleo de los símbolos religiosos en centros públicos en Alemania: la sentencia del Tribunal Constitucional Alemán de 24 de septiembre de 2003*, in *5 Laicidad y libertades* (2005), pp. 295-297.

⁵⁴ For an interesting source of information and documentation on the evolution of the laws enacted by the German states (*Länder*) after the Federal Constitutional Court's judgment, see the Internet pages of the *Institut für europäisches Verfassungsrecht* of the University of Trier: <http://www.uni-trier.de/index.php?id=24373> (accessed 26 October 2013). See also, in Spain, J. Rossell, *La cuestión del velo islámico...*, cit. in note 51, pp. 193 et seq.

⁵⁵ See, for further details and references, R. Navarro-Valls & J. Martínez-Torrón, *Conflictos entre conciencia y ley...*, cited in note 3, pp. 354-355.

Conclusion

In the light of the preceding discussion, and in the light also of the current debates about the place of religion in public life that are developing in Europe, and generally in the West, one may wonder if the display of a particular religious symbol in a public space – a symbol of the majority religion in the country – is the best way to promote pluralism and mutual respect between different religious and belief communities. A direct and unconditional affirmative response would be certainly questionable, and a number of distinctions and nuances should be taken into account. For instance, it would be important to differentiate between the various types of public spaces, to determine who took the initiative to set the symbol in a public place, or to consider if the symbol can be easily removed upon request and if other religious symbols are allowed in the same area. A small crucifix on the wall of a hospital, which can be easily detached or substituted by a symbol of another religion, is definitely not the same as a big cross presiding at a courtroom.

In any event, as has been repeatedly mentioned in this paper, it is not for the courts to decide on public policies regarding religious symbols, and even less for the European Court of Human Rights. Courts are not policy makers. Their role is to apply the law of the land, to adjudicate on rights. In the case of the ECtHR, its role is to decide if the display of a religious symbol in a particular context entails an element of coercion or indoctrination that constitutes a violation of the freedom of thought, conscience or religion guaranteed by article 9 ECHR. With particular reference to the *Lautsi* case, I do not think that the Italian law that imposes the presence of the crucifix in all public schools of the country is a good idea – it would be more appropriate to take such a decision at the local level – but, again, the role of the courts is not to validate the appropriateness of such a political solution but only to ascertain if the static presence of a small crucifix on the wall of a classroom amounts to coercion or indoctrination. And the Grand Chamber of the ECtHR, rightly, concluded that it did not.

It has been often said, and it is true, that the realm of education is particularly sensitive with regard to the presence of religious symbols

– institutional and personal – and other external expressions of religion, for it involves the transmission of values to young generations, the right of parents to decide the religious and moral orientation of their children's education, and the state's obligation to abstain from indoctrination against the parents' wishes, out of respect for the freedom of choice in matters of religion or belief (*forum internum*). In essence, two basic approaches are possible in this matter. One is based on an exclusive notion of state neutrality, which leads to the prohibition of religious symbols in public schools with the aim of eliminating the visibility of religion; an extreme conception of this kind is followed by France, whose law excludes even noticeable personal garments that reveal the students' religion.⁵⁶ The other is based on an inclusive notion of neutrality, and allows for a variety of symbols, institutional and personal, that can coexist and are part of the ordinary 'landscape' of the public school.⁵⁷

⁵⁶ *Loi n.° 2004-228, du 15 mars 2004, encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*. This law and its conception of state neutrality have been recently ratified by the *Charte de la laïcité à l'École*, produced by the French Ministry of Education (circulaire n° 2013-144 du 6-9-2013); text available in: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=73659 (accessed 26 October 2013). For a critical comment on the 2004 French law, see A. Garay, *Secularism, Schools and Religious Affiliation: For a Demanding Account of Law no. 2004-228 of March 15, 2004*, in 'Islam and Political-Cultural Europe' (ed. by W.C. Durham, D.M. Kirkham and T. Lindholm), Ashgate, Aldershot, 2012, pp. 117-145. In the broader context of relations between state and religion in France, see B. Chelini-Pont & T.J. Gunn, *Dieu en France et aux Etats-Unis. Quand les mythes font la loi*, Berg, Paris, 2005. In Spain, see S. Cañamares Arribas, *Libertad religiosa, simbología y laicidad del Estado*, Aranzadi, Pamplona, 2005, pp. 70 et seq.; A. González-Varas Ibáñez, *Confessioni religiose, diritto e scuola pubblica in Italia. Insegnamento, culto e simbologia religiosa nelle scuole pubbliche*, CLUEB, Bologna, 2005, pp. 229 et seq.; M.J. Ciáurriz, *Laicidad y ley sobre los símbolos religiosos en Francia*, in 'El pañuelo islámico en Europa', cit. en nota 51, pp. 91 et seq.

⁵⁷ This is the line that seems to be suggested by the recent *EU Guidelines on the promotion and protection of freedom of religion or belief*, approved by the Council of the European Union on 24 June 2013 (see especially BB 34, 37 & 46). Text available in http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf (accessed 26 October 2013).

Although both approaches are legitimate from the perspective of the ECHR, and in general from the perspective of international standards on religious freedom, I certainly prefer the one based on an inclusive concept of neutrality. Among other things, because it is more realistic than creating an artificial school atmosphere characterized by the absence of religion. I find no reason to require, in a country enjoying religious peace, that there should be no religious symbols visible either in classrooms or in the students' or teachers' clothes. Instead, it is preferable to make it possible for students to see in their own school an evidence of the religious pluralism existing in society. Allowing spontaneous expressions of religious pluralism seems to be more consistent with a neutral attitude of the state, and probably also more educative for students than imposing the fictitious absence of religion. Unless there is a *specific* risk to the public order or the social peace, or unless the presence of religious symbols actually puts pressure on people disagreeing with them, a strict prohibition of external signs of religion – institutional or personal, Christian or of other religions – is not necessary either to preserve state neutrality or to protect the freedom of choice of members of the school community in belief matters.

Indeed, such a prohibition could transmit a wrong subliminal message to young generations. If the school is supposed to be the realm of reason, culture and values, i.e., the domain of civilization, excluding religion from school could be easily understood as implying that religion does not belong in school (while other non-religious beliefs do). I can hardly see it as a manifestation of neutrality.